

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY, CITY & SUBURBAN
DELIVERY SYSTEMS, INC., CITY AND SUBURBAN
DELIVERY SYSTEMS, INC. JANUARY 2009 SEVERANCE
PAY PLAN FOR ELIGIBLE EMPLOYEES REPRESENTED
BY THE NEWSPAPER AND MAIL DELIVERERS' UNION
OF NEW YORK AND VICINITY, PLAN ADMINISTRATOR
OF THE CITY AND SUBURBAN DELIVERY SYSTEMS,
INC. JANUARY 2009 SEVERANCE PAY PLAN FOR
ELIGIBLE EMPLOYEES REPRESENTED BY THE
NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW
YORK AND VICINITY, and ERISA MANAGEMENT
COMMITTEE OF THE NEW YORK TIMES COMPANY,

Civil Action No.

12-CV-5430 (AKH)

Plaintiffs,

- against -

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW
YORK AND VICINITY, ENRIQUE GRADOS, DJEVALIN
GOJANI, CHRISTOPHER FABIANI, RICHARD ATKINS,
RAIMON MORAN, JOHN CASSARO, MUNIR
FAHREDDINE, and WILLIE MILES,

October 9, 2017

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW REGARDING
SUBJECT MATTER JURISDICTION

Preliminary Statement

This is an interpleader action arising from competing claims of eligibility under the buyout provision of the City and Suburban Delivery Systems, Inc. January 2009 Severance Pay Plan for Eligible Employees Represented by the Newspaper and Mail Deliverers' Union of New York and Vicinity (the "Plan"). To ensure that Plaintiffs comply with their fiduciary duty to protect the interests of all participants and beneficiaries in the Plan, Plaintiffs brought this action so that they could deposit with the Court the balance of the buyout funds, to be disbursed under the Plan once all the competing claims have been resolved.

More than five years after Plaintiffs had commenced this action, and after Plaintiffs had deposited \$368,451.40 with the Court, Defendant Newspaper and Mail Deliverers' Union of New York and Vicinity (the "Union") and Intervenor National Labor Relations Board (the "NLRB") assert for the first time that this Court lacks subject matter jurisdiction over this action. They are incorrect. In fact, the Court has at least two independent bases of subject matter jurisdiction over this action, either of which would be sufficient on its own. First, the Court has statutory interpleader jurisdiction under 28 U.S.C. § 1335 because there is diversity of citizenship between two or more adverse claimants and the amount in controversy exceeds \$500. Second, the Court has federal question jurisdiction because this case concerns an ERISA plan. Therefore, the Court should reject the Union's and the NLRB's arguments and retain jurisdiction over this action.

Background

Plaintiffs The New York Times Company ("The Times"), City & Suburban Delivery Systems, Inc. ("C&S"), the Plan, Plan Administrator of the Plan, and ERISA Management Committee of The New York Times Company commenced this action on July 13, 2012. (Compl. (Dkt. No. 1) ¶¶ 2-6.) The Defendants are the Union and eight individual employees of C&S. (Compl. ¶¶ 7-15; Answer of Def. Newspaper and Mail Deliverers' Union (Dkt. No. 13) ("Answer") ¶ 7.)

Plaintiff C&S closed its business on January 4, 2009. (Compl. ¶ 18.) In anticipation of the closing, the Union, C&S, and The Times agreed to establish a plan to offer 140 buyouts, each in the gross amount of \$100,000, to C&S employees in order of their seniority. (Compl. ¶¶ 19-20; Answer ¶ 12.) In order to effectuate that agreement, C&S established the Plan. (Compl. ¶ 23; Answer ¶ 15.)

Based on seniority lists provided by the Union, the Plan Administrator processed and paid buyouts to 134 persons under the buyout provision of the Plan. (Compl. ¶ 25; Answer ¶ 17.) The terms of the Plan limit the number of buyouts to 140. (Compl. ¶ 35.) Since the Plan has already funded 134 buyouts, only six buyouts remain to be funded (Compl. ¶ 35), but each of the eight individual Defendants claims to be entitled to exercise buyout rights under the Plan. (Compl. ¶ 37; Answer ¶ 26.) Plaintiffs take no position as to which of the individual Defendants, if any, is entitled to a buyout payment. (Compl. ¶ 39.)

On December 9, 2016, pursuant to an order of the Court (Dkt. No. 55), The Times deposited \$368,451.40 with the Court. (See Cashiers Office Registry Deposit (attached hereto as Ex. 1); Cashier's Check (attached hereto as Ex. 2).) That amount represents: (a) \$100,000 for each of the remaining six buyout positions, plus (b) interest on the net unpaid buyout positions to the date of the filing of this action, less (c) the value of eight weeks' severance required by the Plan that has already been paid to each of the individual Defendants and (d) applicable withholding taxes required by law. (Compl. ¶ 40.)

Argument

"Federal courts acquire subject matter jurisdiction over interpleader actions in two ways," statutory interpleader or rule interpleader. Sun Life Assurance Co. of Canada v. Diaz, No. 3:14-cv-01685-VAB, 2015 U.S. Dist. LEXIS 52654, at *5-6 (D. Conn. Apr. 22, 2015); see also Weininger v. Castro, 462 F. Supp. 2d 457, 499 (S.D.N.Y. 2006). With respect to statutory interpleader, federal courts have subject matter jurisdiction over "any civil action of interpleader involving \$500 or more if two or more adverse claimants of diverse citizenship claim, or may claim, to be entitled to the property at issue, and if the plaintiff has deposited the subject property into the registry of the court." Sun Life Assurance Co. of Canada, 2015 U.S. Dist. LEXIS 52654, at *5. With respect to

rule interpleader, “Fed. R. Civ. P. 22 provides a procedural mechanism for bringing an interpleader action in federal court, but there must be an independent basis for subject matter jurisdiction.” Id. at *6.

The Court has subject matter jurisdiction over this action under both the statutory interpleader and rule interpleader jurisdiction requirements. There is statutory interpleader jurisdiction because this action involves more than \$500, two or more of the individual defendants who claim or may claim to be entitled to the property at issue are citizens of different states, and The Times has deposited the subject property into the registry of the Court. 28 U.S.C. § 1335(a). Separately, ERISA provides a basis for rule interpleader jurisdiction because Plaintiffs’ Complaint concerns a request for interpleader relief by ERISA plan fiduciaries to resolve conflicting claims to plan benefits. Sun Life Assurance Co. of Canada, 2015 U.S. Dist. LEXIS 52654, at *6 (citing Metro. Life Ins. Co. v. Bigelow, 283 F.3d 436, 439-40 (2d Cir. 2002)).

A. The Court Has Statutory Interpleader Jurisdiction Under 28 U.S.C. § 1335.

There are three requirements for statutory interpleader jurisdiction: (1) the claim must involve \$500 or more; (2) there must be two or more adverse claimants of diverse citizenship who claim, or may claim, to be entitled to the property at issue; and (3) the plaintiff must deposit the subject property into the registry of the court. See 28 U.S.C. § 1335(a); Locals 40, 361 & 417 Pension Fund v. McInerney, No. 06 Civ. 5224, 2007 U.S. Dist. LEXIS 1974, at *7-8 (S.D.N.Y. Jan. 9, 2007). All three requirements are satisfied here.

First, Plaintiffs’ interpleader claim involves more than \$500. This case concerns the individual defendants’ claims to be entitled to exercise rights under the buyout provision of the Plan. (Compl. ¶ 37.) The Plan provides for a total of 140 buyouts (Plan (attached hereto as Ex. 3) at Article IV ¶ A.1), 134 of which were fully funded before this case began, leaving six remaining

buyouts to be funded. (Compl. ¶ 39.) The total funding for those six remaining buyouts is \$368,451.40. (Compl. ¶ 40.)

Second, two or more adverse claimants of diverse citizenship claim to be entitled to exercise buyout rights under the Plan. All eight individual defendants claim to be entitled to one of the six remaining buyouts under the Plan. (Compl. ¶ 37; Answer ¶ 26.) Of those eight, at least one is a resident of New York, and at least one is a resident of Connecticut. (See Decl. of Christopher Fabiani (attached hereto as Ex. 4); Decl. of Djevalin Gojani (attached hereto as Ex. 5).) That is sufficient to satisfy 28 U.S.C. § 1335, which “has been uniformly construed to require only ‘minimal diversity,’ that is, diversity of citizenship between two or more claimants, without regard to the circumstance that other rival claimants may be cocitizens.” State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530 (1967); see also, e.g., RCA Records v. Hanks, 548 F. Supp. 979, 981 (S.D.N.Y. 1982) (“Subject matter jurisdiction in statutory interpleader actions rests on diversity of citizenship between any two adverse claimants and an amount in controversy of \$500 or more.”). “The citizenship of the stakeholder is irrelevant for jurisdictional purposes in statutory interpleader actions.” Fed. Ins. Co. v. Tyco Int’l Ltd., 422 F. Supp. 2d 357, 393 (S.D.N.Y. 2006).

Third, and finally, The Times has deposited the subject property into the registry of the Court. The Times deposited \$368,451.40 with the Court on December 9, 2016. (See Cashiers Office Registry Deposit (Ex. 1); Cashier’s Check (Ex. 2).)

All three requirements of statutory interpleader jurisdiction are satisfied. Therefore, the Court has subject matter jurisdiction under 28 U.S.C. § 1335, and must retain jurisdiction over this case for that reason alone.

B. The Court Has Rule Interpleader Jurisdiction Under ERISA.

In addition, the Court also has rule interpleader jurisdiction under ERISA. It is beyond dispute that federal courts have subject matter jurisdiction over interpleader actions brought by ERISA plan fiduciaries to resolve competing claims to benefits under an ERISA plan. See Metro. Life Ins. Co. v. Bigelow, 283 F.3d 436, 439-40 (2d Cir. 2002); Locals 40, 361 & 417 Pension Fund v. McInerney, No. 06 Civ. 5224, 2007 U.S. Dist. LEXIS 1974, at *8 (S.D.N.Y. Jan. 9, 2007). The Second Circuit held in Bigelow:

Initially we note that MetLife and GE, as fiduciaries of the Plans, had standing to bring an interpleader action pursuant to Fed. R. Civ. P. 22 and 29 U.S.C. § 1132(a)(3)(B), and that federal subject matter jurisdiction exists under 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331. See Aetna Life Ins. Co. v. Bayona, 223 F.3d 1030, 1033-34 (9th Cir. 2000); Metro. Life Ins. Co. v. Marsh, 119 F.3d 415, 418 (6th Cir. 1997).

Bigelow, 283 F.3d at 439-40.

Bigelow disposes of the NLRB's argument that "this Court does not appear to have jurisdiction under ERISA to make eligibility determinations . . . or to distribute contractual buyouts based on those determinations." (National Labor Relations Board's Suggestion of Lack of Subject-Matter Jurisdiction (Dkt. No. 87) at 3.) Contrary to the NLRB's argument, making eligibility determinations and distributing plan benefits is precisely what the court does in an ERISA interpleader action. See Bigelow, 283 F.3d at 438, 444 (determining proper beneficiaries of ERISA plans). "There is no doubt that this Court has jurisdiction" over such an action. Unum Life Ins. Co. of Am. v. Scott, No. 3:10CV00538, 2012 U.S. Dist. LEXIS 8869, at *3 (D. Conn. Jan. 24, 2012). Similarly, there is no doubt that a plan fiduciary's interpleader action is, in the NLRB's terms, "a cognizable claim for the Court to resolve under ERISA." (Dkt. No. 87 at 6.) Bigelow, 283 F.3d at 439-40.

Next, the NLRB argues that ERISA only authorizes actions by "participants, beneficiaries, fiduciaries, and the Secretary of Labor." (Dkt. No. 87 at 4.) At least two of the Plaintiffs, however,

are fiduciaries of the Plan: the Plan Administrator (currently the Director, Corporate Benefits of The New York Times Company), which resolves claims for benefits under the Plan, and the ERISA Management Committee of The New York Times Company, which resolves appeals of benefits claims under the Plan. (Plan (Ex. 3) at Article II ¶ 7, Article VII ¶ 1; Compl. ¶¶ 5, 6.) See Aetna Health Inc. v. Davila, 542 U.S. 200, 218-19 (2004) (“A benefit determination under ERISA . . . is generally a fiduciary act” and is “part and parcel of the ordinary fiduciary responsibilities connected to the administration of a plan.”).

Next, the NLRB argues that ERISA Section 502(a)(3) only authorizes suits for relief that were typically available in equity. (Dkt. No. 87 at 5.) This argument does not help the NLRB here because interpleader relief was available in equity. See Ross v. Bernhard, 396 U.S. 531, 542 (1970) (“Before merger interpleader actions lay only in equity.”); Truck-A-Tune, Inc. v. Re, 23 F.3d 60, 62 (2d Cir. 1994) (“Interpleader is an equitable proceeding.”). Indeed, the Second Circuit has held that fiduciaries of an ERISA plan may bring an interpleader action under Section 502(a)(3). Bigelow, 283 F.3d at 439-40.

The Union’s arguments fare no better than the NLRB’s. The Union argues that the Plan is not an ERISA plan because “[t]he buyouts and severance payments under the Plan are one shot lump sum payments.” (Supp. Reply of Def. Newspaper and Mail Deliverers’ Union of New York and Vicinity to Intervenor National Labor Relations Board’s Mot. to Stay (Dkt. No. 86) at 4.) Contrary to the Union’s argument, however,

the mere fact that a plan calls for a ‘one time’ payment, like severance, does not require a finding that such a payment is not made pursuant to an ERISA plan. If that were the case, the payment of severance would never constitute an ERISA plan. This, however, is clearly not the law. See Tischmann v. ITT/Sheraton Corp., 145 F.3d 561, 565 (2d Cir. 1998) (“well-established” that severance plans can constitute ERISA plans); Schonholz v. Long Island Jewish Medical Center, 87 F.3d 72, 75 (2d Cir. 1996) (“employee benefit plan” under ERISA held to “apply to most, but not all, employer undertakings or obligations to pay severance benefits”); James v. Fleet/Norstar Group, 992 F.2d 463, 467-68 (2d Cir. 1993)

(“there is no question that a program to pay severance benefits may constitute an ‘employee welfare plan.’”) (citation omitted).

Ebenstein v. Ericsson Internet Applications, Inc., 263 F. Supp. 2d 636, 641 (E.D.N.Y. 2003). The Plan itself states that it “is intended to fall within the definition of an employee welfare benefit plan under Section 3(l) of” ERISA. (Plan (Ex. 3) at Article I.)

In Schonholz, the Second Circuit identified three factors to be considered in determining whether a severance plan is an ERISA plan: (1) whether the employer’s undertaking or obligation requires managerial discretion in its administration, (2) whether a reasonable employee would perceive an ongoing commitment by the employer to provide employee benefits, and (3) whether the employer was required to analyze the circumstances of each employee’s termination separately in light of certain criteria. Schonholz, 87 F.3d at 76 (citations omitted) (declining to decide which of the factors will be determinative in every case). The Court in Schonholz concluded that all three factors favored the applicability of ERISA in that case. Id. The same is true here.

Here, as in Schonholz, all three factors support the applicability of ERISA. First, administering the Plan requires managerial discretion. (See, e.g., Plan (Ex. 3) at Article III (“the Employer reserves to itself the right in its sole and absolute discretion to determine whether or not you will become a Participant in the Plan”); id. at Article VI ¶ 2 (Plan Administrator and its delegates have “complete authority, in [their] sole and absolute discretion, to construe the terms of the Plan . . . and to determine the eligibility for, and amount of, benefits due under the Plan to Participants”).) Second, a reasonable employee would perceive an ongoing commitment to provide benefits, either in the form of a buyout or basic severance. (Id. at Article IV.) Third, each employee’s eligibility for benefits under the Plan would have to be individually determined. (See id. at Article III.) See Tischmann, 145 F.3d at 566-67 (severance plan requiring individual determinations regarding eligibility constitutes an ERISA plan); Ebenstein, 263 F. Supp. 2d at 642

(“Since severance pay is not made in every case of separation, the policy requires administration to determine individual eligibility. These factors weigh in favor of a finding of an ERISA plan.”).

As in Schonholz and Tischmann, a severance plan was held to constitute an ERISA plan in Kosakow v. New Rochelle Radiology Associates, P.C., 274 F.3d 706 (2d Cir. 2001). The decision in Kosakow was based, in part, on the fact that the plan provided for the forfeiture of severance pay in the case of certain “for cause” terminations, which necessitated individual eligibility determinations. Id. at 737. Similarly, here, the Plan requires that, to be a Participant, one must “remain in the continuous employ of the Employer as an Eligible Employee through your Separation Date, subject to the standards of satisfactory job performance.” (Plan (Ex. 3) at Article III ¶ 3.)

The Union also argues that the ERISA statute of limitations has expired. (Dkt. No. 86 at 5-6.) This argument is irrelevant to the issue before the Court because “[a] statute of limitations defense . . . is not ‘jurisdictional.’” Day v. McDonough, 547 U.S. 198, 205 (2006); see also Chimblo v. C.I.R., 177 F.3d 119, 125 (2d Cir. 1999) (“[T]he statute of limitations is an affirmative defense that must be pleaded; it is not jurisdictional.”). Regardless, the Union does not even argue that Plaintiffs’ Complaint – which they filed in 2012 – is time-barred. (Dkt. No. 86 at 5-6.) Rather, the Union seems to argue that a hypothetical claim by the individual Defendants would be time-barred if it were to be filed today. (Id.) That argument is irrelevant to the question of the Court’s subject matter jurisdiction over Plaintiffs’ interpleader action.¹

¹ The NLRB also argues that the National Labor Relations Act and the Labor Management Relations Act (“LMRA”) do not provide grounds for subject matter jurisdiction (Dkt. No. 87 at 7-10), and the Union argues that the statute of limitations for a claim under the LMRA has expired (Dkt. No. 86 at 2-4), but those arguments are irrelevant in light of this Court’s jurisdiction under 28 U.S.C. § 1335 and ERISA.

The Plan is an ERISA plan, and at least some of the Plaintiffs are fiduciaries of the Plan. Therefore, ERISA provides a basis for subject matter jurisdiction via the rule interpleader provision of Fed. R. Civ. P. 22.

Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court conclude that it has subject matter jurisdiction, and retain jurisdiction over this case.

Dated: October 9, 2017
Stamford, CT

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AFFIRMATION OF SERVICE

I, Daniel L. Schwartz, declare under penalty of perjury that I served a copy of the attached Plaintiffs' Memorandum of Law Regarding Subject Matter Jurisdiction upon the following parties in this case by first-class mail:

Raimon Moran
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All other parties in this case were served electronically by the Court's CM/ECF system.

Dated: October 9, 2017

s/ Daniel L. Schwartz